

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

JO-CARROLL ENERGY, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 02-0593
	)	
ALLIANT d/b/a INTERSTATE POWER AND	)	
LIGHT CO.,	)	
	)	
Respondent.	)	

**RESPONSE IN SUPPORT OF MOTION TO STRIKE**

Now comes INTERSTATE POWER AND LIGHT CO., (“Respondent” or “Interstate”) by DEFREES & FISKE, Leslie Recht and W. Michael Seidel of counsel, and hereby submits its Response to the Reply by Jo-Carroll Energy, Inc. (“Complainant” or “Jo-Carroll”) to Interstate’s Motion to Strike Count II of the Amended Complaint filed herein by Jo-Carroll Energy, Inc.

Jo-Carroll’s Reply contends that Interstate has waived its rights to object to the pleadings because it has answered the Amended Complaint, citing Burks Drywall, Inc. v. Washington Bank and Trust Company, 110 Ill.App.3d 569, 442 N.E.2d 648 (2d Dist. 1982). However, the Burks case actually states: “where a complaint substantially although imperfectly alleges a cause of action, the defendant waives any defect by answering it *without objection*.” 442 N.E.2d at 651 (emphasis added.) Interstate did not answer the complaint without objection, but contemporaneously filed its objections with its answer and Motion to Strike. Moreover, the Burks

case recognizes an exception to the rule “where the complaint wholly fails to state a cause of action.” 442 N.E.2d at 651. The other case cited by Jo-Carroll, Aura v. Chui, 279 Ill.App.3d 321, 664 N.E.2d 1101 (2d Dist. 1996), also noted that “courts draw a distinction between a complaint that alleges no cause of action, *which may be challenged at any time*, and one which is defective or imperfectly alleges a cause of action.” (Emphasis added.) These cases thus recognize exceptions to the general rule of filing a pre-answer Section 2-615 motion that attacks defects appearing on the face of the pleading. These exceptions are that the plaintiff has failed to state a claim on which relief may be granted, or that the pleadings entitle the moving party to judgment. See “Pre-trial Motions Under Sections 2-615 and 2-619”, CBA Record, (November 1989) page 31. Interstate’s Motion to Strike fits within the exceptions noted above.

Count II of Jo-Carroll’s Amended Complaint should be stricken because the pleadings disclose, and there is no material issue of fact, that the Commission has not approved any contract that would entitle Jo-Carroll to furnish service to the customer pursuant to Section 6 of the Electric Supplier Act (“ESA”). Since no contract has been approved, Interstate’s right to serve the customer who is the subject of the complaint is governed by Section 8 of the Electric Supplier Act. If, in the future, a contract is approved by the Commission (Interstate denies any such contract currently exists), that limitation would apply to future applicants for service.

Jo-Carroll’s reliance argument is equally unavailing. First, the ESA specifies a contract approved by the Commission in order for Section 6 to apply, and makes no provision for a right to serve based upon an estoppel theory in lieu of a Commission-approved contract. Furthermore, Jo-Carroll’s reliance is unjustified given that the Commission never approved the alleged contract and no legitimate expectation of an entitlement to furnish service can arise prior to Commission


approval. Jo-Carroll has only itself to blame for any unrealized expectations because of its own failure to seek approval of the maps that Jo-Carroll now characterizes as a contract. If Jo-Carroll had considered the maps to be an agreement under Section 6, then Jo-Carroll would have logically submitted the maps to the Commission for approval soon after they were created, rather than waiting for almost seven years before raising the possibility that the maps represented an agreement requiring Commission approval.

Interstate's Motion to Strike Count II is also appropriate because the pleadings establish no material issue of fact regarding an essential element to Jo-Carroll's right to the relief claimed. Paragraph 6 of Count II plainly alleges that any right to relief is based upon an authorized representative of Interstate having "signed such map and by virtue thereof designated the territories that each of the electric suppliers would serve subject to the approval of the Illinois Commerce Commission." This allegation is plainly contrary to the attached exhibit, which on its face contains no words of agreement and conspicuously lacks any provision agreeing to seek Commission approval of the maps. Rather, the exhibit explicitly negates any agreement, and expressly describes that the parties only "looked at" the maps rather than agreed to anything. Where there is a discrepancy between the allegations of Count II and the exhibit attached to the Amended Complaint, which is relied upon as the basis for the relief requested, the exhibit controls. For this reason, the pleadings demonstrate that the relief prayed for is not merited, so that the Count should be stricken. Stap v. Chicago Aces Tennis Team, Inc., 63 Ill.App.3d 23, 379 N.E.2d 1298 (1<sup>st</sup> Dist. 1978).

For the reasons stated herein and in the Motion to Strike, Interstate respectfully requests that Count II of the Amended Complaint be stricken because it is substantially insufficient in law.

Respectfully submitted,

INTERSTATE POWER AND LIGHT COMPANY

By:   
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STATE OF ILLINOIS       )  
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COUNTY OF COOK       )

**CERTIFICATE OF SERVICE**

The undersigned, Leslie Recht, an attorney, certifies that she served a copy of the forgoing Response in Support of Motion to Strike Count II of the Amended Complaint of Jo-Carroll Energy, Inc., on this 11<sup>th</sup> day of April 2003, by depositing in the United States mail at the post office at Chicago, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set below their names:

Michael Wallace  
Administrative Law Judge  
Illinois Commerce Commission  
527 East Capitol  
Springfield, IL 62701-1827

Jerry Tice, Esq.  
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By:   
Leslie Recht